

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE: B-211650

DATE: September 20, 1983

MATTER OF: Fairchild Weston Systems Inc.

DIGEST:

1. While Government may consider other factors (relating to costs) in addition to the bid price in determining the low evaluated bid and, therefore, the bid most advantageous to the Government, the solicitation must provide for the evaluation of those factors before they may be considered. Factors which are not included in the solicitation evaluation criteria may not be considered during bid evaluation.
2. Protest against failure of agency to include certain cost factors in bid evaluation criteria is untimely and not for consideration since the issue was not raised prior to bid opening.
3. Protest against failure of agency to incorporate into specifications certain alleged changes in agency needs is untimely where not raised within 10 working days after protester knew or should have known of the basis for protest.

Fairchild Weston Systems Inc. (Fairchild) protests the proposed award to Climatronics Corporation, the low bidder under Federal Aviation Administration (FAA) invitation for bids No. DTFA01-83-B-27038--the advertised second step of a two-step procurement of Low Level Windshear Alert Systems.

We deny the protest in part and dismiss it in part.

Fairchild believes that the award evaluation was not made in a manner that ensures the most advantageous award to the Government. Fairchild notes that in Federal Procurement Regulations (FPR) § 1-2.407-1 (1964 ed.), it is provided that contracts shall be awarded "to that responsible bidder whose bid, conforming to the invitation for bids, will be

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most advantageous to the Government, price and other factors considered." (Emphasis added.) Fairchild cites five factors which it believes should have been considered. These are development risks, added procurement costs, inventory/depot support, safety, and the cost of future system modifications. Had these factors been considered, Fairchild contends it would have submitted the lowest evaluated bid.

Second, Fairchild maintains that due to the recent realization of the danger of microburst weather conditions to aircraft and the consequent decision of the FAA to install an enhanced system at the New Orleans Airport in January 1984, it would appear inappropriate at this time to procure systems which are known to be ineffective for detecting this weather threat.

Fairchild also states that by the FAA assigning National Stock Numbers (NSN) to the subsystems being procured in the solicitation, Fairchild was misled into believing that the system being procured had to be interchangeable with the Fairchild system previously supplied. Had it known this not to be the case, Fairchild could have offered a less expensive system than it did. The FAA points out that the NSN's were for future use for the system being procured and had no meaning as regarded the Fairchild system. Fairchild concedes this point now.

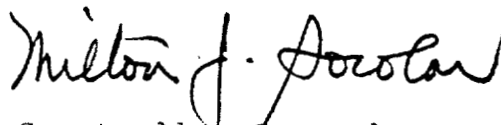
We do not believe that there is any legal basis for the Fairchild contention that the FAA should have considered the five criteria set forth by Fairchild in the evaluation of bids. In determining the bid most advantageous to the Government, the contracting agency must accept the low bid, evaluated in accordance with the provisions of the invitation, assuming the low bidder is responsible. While the Government may consider other factors (relating to costs) in addition to the bid prices in determining the low evaluated bid and, therefore, the bid most advantageous to the Government, the invitation must provide for the evaluation of those other factors. Refre and Associates, B-197097, April 25, 1980, 80-1 CPD 298, reconsidered, B-197097, July 7, 1980, 80-2 CPD 13. Since the evaluation clause in the invitation did not provide for a bid evaluation based upon the five factors enumerated by Fairchild, the contracting agency could not have legally evaluated bids in the manner that Fairchild advocates.

To the extent that Fairchild may be objecting to the fact that the bid evaluation clause in the invitation did not include these factors, the protest is untimely and not

for consideration under our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(1) (1983), which require that protests based upon alleged improprieties apparent prior to bid opening must be filed prior to bid opening.

Finally, the contention that the specifications in this invitation do not meet the present needs of the FAA and that the invitation therefore should be canceled and the procurement be resolicited after the specifications are revised is also untimely filed. We have been advised that on July 28, Fairchild was awarded the contract for the enhanced system to be installed at the New Orleans Airport. Fairchild thus knew of these alleged changed FAA needs by July 28. However, its protest on this matter was not filed with our Office until more than 10 working days after July 28. See 4 C.F.R. § 21.2(b)(2) (1983).

Accordingly, the protest is denied part and dismissed in part.

for 
Comptroller General
of the United States